85-1098 (1)

No.....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

CRAIG VEVODA, KENNETH CHAMNESS AND MARK SOTTANA,

Petitioners,

vs.

MILK DRIVERS AND DAIRY EMPLOYEES UNION, TEAMSTERS LOCAL 302,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Do employees knowingly and voluntarily become union members, subject to union-imposed fines, where their union misleads them into believing that full membership is legally required?

2. Does a union's fraud preclude judicial enforcement of strike-levied fines?

3. When a union sues to enforce its membership contract (its constitution) to collect strike-related fines, does a federal court have jurisdiction to determine that the union's fraud renders the contract unenforceable?[1]

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[1] The only interested parties other than those designated in the caption are two labor organizations, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, and Teamsters Joint Council No. 7, both of which were plaintiffs in the District Court and neither of which appealed the District Court's judgment.

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The Petitioners, Craig Vevoda, Kenneth Chamness, and Mark Sottana, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Judicial Circuit entered on September 24, 1985.

CITATION TO OPINION BELOW

The decision of the Court of Appeals is officially reported at 772 F.2d 530 and appears in Appendix "A", *infra* (pp. A1-A8). The decision of the United States District Court for the Northern District of California is officially reported at 587 F.Supp. 483 (1984) and appears in Appendix "B", *infra* (pp. B1-B6).

JURISDICTION

The judgment of the Court of Appeals was entered on September 24, 1985. No petition for rehearing having been filed, this petition for certiorari is filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The only federal statutes involved are Sections 7, 8(b)(1)(A), and 301(a) of the Labor-Management Relations Act (29 U.S.C. §§ 157, 158(b)(1)(A), and 185(a), hereinafter "LMRA") and Section 1337 of the Judicial Code (28 U.S.C. § 1337), all of which are set forth in Appendix "C", *infra* (pp. C1-C2).

Sections 1565, 1566, 1567, 1572, 1573, 1577, 1578, and 1689(b)(1) of the California Civil Code are also set forth in Appendix "C", *infra* (pp. C2 - C4). No constitutional provisions are implicated.

STATEMENT OF THE CASE

A. The Facts.[2]

Kenneth Chamness, Craig Vevoda, and Mark Sottana (hereinafter "Chamness", "Vevoda", and "Sottana") began their employment with Lucky Stores in October of 1975, June of 1976, and July of 1976, respectively. At that time and thereafter, the three were represented for purposes of collective bargaining by Milk Drivers and Dairy Employees Union, Teamsters Local 302 (hereinafter "Local 302" or "Union").

Within thirty days of their employment, Vevoda and Sottana went to Local 302's offices. Both were told by an employee of Local 302 that they had to complete a "membership application form" and attend an orientation meeting. Vevoda and Sottana each executed the membership application. During the orientation meeting they were told by Local 302's chief executive officer that they were required to take an oath of membership, which they did.

When Chamness began working for Lucky Stores, he was already a member of Local 302. Chamness had joined the Union in 1956 while working for Williams Dairy. Upon commencing work at Williams Dairy, Chamness obtained a "transfer slip" from Teamsters Local 78, a union in which he was already a member. He submitted this transfer slip to Local 302 and attended an orientation meeting

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[2] The facts are essentially as set forth in the Ninth Circuit's opinion. (*Infra*, pp. A1-A4.) The factual record before the District Court was uncontroverted. (*Infra*, p. B1.) Each of the petitioners filed declarations in support of their joint motion for summary judgment. The Union limited its response to legal argument.

conducted by an officer of Local 302. At the orientation meeting, Chamness was instructed to take an oath of membership, and did so.

As a result of the statements made by Local 302, Vevoda, Chamness, and Sottana all became and thereafter remained full-fledged members of Local 302, subject to its bylaws and the Constitution of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its affiliated parent labor organization. Correspondingly, at all times, the "union security clause" included in the collective bargaining agreement in effect between Lucky Stores and Local 302 ostensibly required full union membership as a condition of employment. *(Infra,* p. A8.)

At no time were any of the three advised by Local 302 that they were not required to become or remain members of the Union. At no time were any of the three told that they had a right to resign their membership. None of the three would have chosen to become members or remain members had they known the truth.

In 1978, Vevoda, Chamness and Sottana were charged by the Union's chief executive officer with violating the Union's bylaws and the International's Constitution for allegedly working behind and/or crossing a picket line. After a "trial" at which they were found guilty, the Union fined Vevoda, Chamness and Sottana the sums of $5,143.16, $4,649.66, and $3,732.80, respectively. Their subsequent intra-union appeals were denied, and the decision sustaining the fines became final on July 31, 1979.

B. The District Court's Decision.

Some three years later, Local 302 filed a complaint in the Municipal Court of the State of California for breach of contract (Local 302's bylaws and the International's Constitution) seeking to collect these fines. The complaint was immediately removed to federal court pursuant to Section 301 of the LMRA.[3]

Chamness, Vevoda and Sottana asserted that the fines imposed upon them could not be judicially enforced because they had been fraudulently induced to become members of the Union, subject to its discipline. They jointly moved for summary judgment on the basis, among others, that the affirmative acts of Local 302 vitiated their consent to the contract Local 302 sought to enforce.

Reasoning that the validity of the fines was premised on the existence of a binding contract, the District Court found it necessary to consider, as with any contract, whether the contract was the result of free consent. Finding consent lacking, the District Court sustained the defense raised, holding:

> "Thus, these defendants have made an uncontroverted showing that they were misled by express statements

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[3] The District Court, *sua sponte*, questioned subject matter jurisdiction. Aware (1) that union fine actions were thought to be governed by state law (*NLRB v. Boeing Co.*, 412 U.S. 67 (1973); but see *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, n. 37 (1967)), and (2) that the existence of federal jurisdiction had yet to be decided (*Plumbers v. Plumbers Local 334*, 452 U.S. 615, n. 16 (1981)), the District Court concluded that the clear import of *Plumbers* mandated subject matter jurisdiction. In its Opinion, the Ninth Circuit did not address the issue other than to state that the District Court had jurisdiction under Section 301. (*Infra*, p. A1.)

> of union personnel into believing that they were required to become full members of the union in order to retain their jobs, and that they remained union members from the time that they first joined and throughout the strike only because they never learned of their right to resign from the union without forfeiting their jobs. This showing is sufficient to demonstrate that defendants did not knowingly and willingly subject themselves to the union's internal disciplinary provisions and procedures, thus precluding enforcement of the contract against them. The affirmative acts of union representatives in misinforming defendants that they were required to submit membership applications and to take the membership oath vitiated defendants' consent to enter into the contract which the union now seeks to enforce against them." *(Infra,* p. B2.)

The District Court rejected the Union's claim that the issue of whether Chamness, Vevoda, and Sottana voluntarily became or remained full union members was exclusively within the purview of the National Labor Relations Board ("NLRB"). (*Infra,* p. B3.) Focusing on the contractual issues presented by the Complaint, the District Court held that the defense asserted posed "no danger of *conflict* with any ruling of the NLRB or policy of the federal labor law." (Original emphasis; *infra,* p. B4.)

C. The Court of Appeals' Opinion.

The Ninth Circuit Court of Appeals reversed. The Court concluded that the issue of "voluntariness" was within the primary jurisdiction of the NLRB and therefore could not be entertained by the District Court. *(Infra,* p. A5.) Though acknowledging that the fines are enforceable only if a contractual relationship exists, the Ninth Circuit prohibits any inquiry into the validity of the contract.

Alternatively, but in the most perfunctory manner, the Ninth Circuit concluded that Local 302's actions were insufficient to vitiate the consent necessary to establish a valid contract. (*Infra*, pp. A6-A7.) This conclusion is contrary to California law as well as the duty of fair representation imposed on unions by this Court. In *toto*, the decision undercuts, if not destroys, the policy of employee freedom of association embodied in statute, legislative history, and this Court's decisions.

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REASONS FOR GRANTING THE WRIT

A. The Judgment Below Stands In Outright Defiance Of Fundamental National Labor Law Principles.

Because of the inherent inequality in the relationship between a union and its members, this Court has long been concerned with the right of a union to fine its members. *E.g., NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967). Judicial tolerance of union-imposed fines has been expressly conditioned on a member's *voluntarily* undertaking the obligations of full-fledged union membership. *E.g., Scofield v. NLRB*, 394 U.S. 423, 435 (1969).

Recognizing (1) that the relationship between a union and its members is contractual (*NLRB v. Boeing Co.*, 412 U.S. 67, 75-76 (1973)), and (2) that, as a matter of law, nothing compels an employee to enter into the contractual relationship in the first instance (*NLRB v. General Motors Corp.*, 373 U.S. 734, 742-743 (1963)), this Court has reasoned that no federal policy bars enforcement of a *vol-*

untarily undertaken obligation. NLRB v. Allis-Chalmers Mfg. Co., supra. Indeed, even where members of the Court have disagreed, there has always been unanimity that the obligations of union membership must be freely and knowingly accepted to be enforceable. *E.g., Pattern Makers League of No. America v. NLRB,* — U.S. —, 105 S.Ct. 3064, 3082-3083 (1985) (Justice Blackmun dissenting).

Despite this twenty-year history, the Ninth Circuit refuses to consider whether Vevoda, Chamness, and Sottana voluntarily undertook the contractual obligation which resulted in their being fined. A defense expressly permitted by this Court and at the heart of federal labor policy has been categorically rejected by the Court of Appeals.

In rejecting jurisdiction, the Ninth Circuit has placed itself squarely in conflict with the exercise of jurisdiction required by *Vaca v. Sipes,* 385 U.S. 171, 186 (1967), over claims for a union's breach of the duty of fair representation - even though such claims arguably fall within the purview of the NLRB. In fact, Section 301 jurisdiction over analogous claims is expressly contemplated in *Motor Coach Employees v. Lockridge,* 403 U.S. 274, 299-301 (1971). As a result, the Fourth, Fifth, Seventh, and District of Columbia Circuits have had no difficulty in finding jurisdiction over claims comparable to the defense rejected by the Ninth Circuit. (See cases cited *infra,* pp. 10-12.)

The Ninth Circuit's refusal to consider the defense of voluntariness is also an explicit rejection of other branches of preemption analysis established by this Court. *Local Union 189, Amalgamated Meat Cutters v. Jewel Tea Co.,* 381 U.S. 676 (1965); *Kaiser Steel Corp. v. Mullins,* 455 U.S. 72 (1982); *Belknap, Inc. v. Hale,* 463 U.S. 491 (1983); and *Ass'n. of Machinists v. Gonzales,* 356 U.S. 617 (1958).

Stranger yet is the Ninth Circuit's conclusion that the Union's conduct in misleading its members did not constitute fraud, whether negligent or intentional, sufficient to vitiate the consent given. The Ninth Circuit's finding that a fiduciary may profit from its deceit is contrary to California statutory and case law as well as to numerous decisions issued by every Circuit Court of Appeal in delineating the duty of fair representation owed union members.

B. Jurisdiction Under Section 301 Of The LMRA Overlaps The Jurisdiction Of The NLRB.

In finding that the issue of voluntariness resides within the primary jurisdiction of the NLRB, the Ninth Circuit miscomprehends the scope of that doctrine as well as the jurisdictional reach of Section 301. The doctrine of primary jurisdiction has no applicability where (1) the administrative processes are irrelevant to the legal issues raised; (2) the issue is within the usual competence of the judiciary; and (3) the NLRB would not have jurisdiction to hear the dispute in which the issue arises. *Local Union 189, Amalgamated Meat Cutters v. Jewel Tea Co., supra,* at pp. 686-687.

All three factors are present here. Like the antitrust claim at issue in *Jewel Tea,* a complaint to collect a union-imposed fine is outside of the NLRB's jurisdiction. *NLRB v. Boeing Co., supra.* Nor would the NLRB's focus be identical. The NLRB is only interested in the union's actions vis-a-vis union members *where* such actions implicate *the employment relationship. Miranda Fuel Co.,* 140 NLRB 181 (1962), *enf. den. on other grounds,* 326 F.2d 172 (2nd Cir. 1963); and *Utility Workers Union of America,*

Local 223, Case No. 7-CB-6295, 119 LRRM 1309 (Div. of Advice, 1985). The NLRB "has no power to adjudicate the validity or effect of such contracts except as to their effect on matters within its jurisdiction." *Belknap v. Hale, supra*, quoting *J. I. Case Co. v. NLRB*, 321 U.S. 332, 340 (1944). In contrast, the District Court's inquiry was directed to a contractual issue, to wit, whether Vevoda, Chamness, and Sottana *knowingly* consented to become union members - an issue necessarily encompassed in a contract action. The legality of the Union's conduct under the LMRA is irrelevant to this determination.[4]

The primary jurisdiction doctrine has no applicability for a much more fundamental reason. The District Court's jurisdiction was premised on Section 301 of the LMRA. This Court has long held that federal courts have jurisdiction under Section 301 to decide issues over which the NLRB has concurrent jurisdiction. *Smith v. Evening News Ass'n.*, 371 U.S. 195 (1962); and *Arnold Co. v. Carpenters District Council*, 417 U.S. 12, 16 (1974) (". . . the *Garmon* [preemption] doctrine is 'not relevant' to actions within the purview of § 301."). Simply stated, "the authority of the Board to deal with an unfair labor practice which also violates a . . . contract . . . is not exclusive . . ." 371 U.S. at 197.

Specifically, this Court has found jurisdiction over actions against unions for breach of the duty of fair repre-

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[4] A slightly different set of facts is illustrative of the distinction. Unquestionably, it is an unfair labor practice for a union to fine or to sue to collect a fine imposed on a member who has resigned. *NLRB v. Textile Workers*, 409 U.S. 213 (1972). Yet if sued, could not the ex-member defend against the complaint by asserting the lack of a contract? The focus of the defense is the contractual issue raised and not the legality of the union's conduct. The Ninth Circuit's analysis would bar such a defense.

sentation though *such claims are also cognizable by the NLRB. Vaca v. Sipes, supra.* The Ninth Circuit did not consider nor discuss *Vaca* though it, along with other Courts of Appeal, has held that a union member need not allege a breach of a collective bargaining agreement in order to bring an action for breach of the duty of fair representation. *Retana v. Elevator Operators Union,* 453 F.2d 1018, 1022 (9th Cir. 1972) (and see cases cited therein). Though the circuit courts often premise jurisdiction on Section 1337 of the Judicial Code (28 U.S.C. § 1337), in *Lockridge* this Court read *Vaca* as extending federal subject matter jurisdiction "even if the conduct complained of was arguably protected or prohibited by the National Labor Relations Act and whether or not the lawsuit was bottomed on a collective bargaining agreement." *Supra,* at 299.

Without doubt, if Vevoda, Chamness and Sottana had used Section 301 as a sword asserting that the Union's misrepresentations were an actionable breach of the Union's fiduciary obligation, the District Court would have had jurisdiction under either Section 301 or 28 U.S.C. § 1337.[5] Yet, the Ninth Circuit refuses to permit the converse defense to be raised as a shield to the Union's sword. The difference goes unexplained.

The Ninth Circuit's decision is also in direct conflict with decisions issued by its sister circuits. In *Marden v. IAM,* 576 F.2d 576 (1978), the Fifth Circuit entertained the *identical* issue raised by a *plaintiff* in a case arising under the Railway Labor Act (45 U.S.C. § 151, *et seq.*).

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[5] In point of fact, Sottana, in his answer, filed such a counterclaim. Subsequently, it was voluntarily dismissed.

> "Appellant contends that, via the Notice of Union Membership Requirement, he was essentially hoodwinked into joining the Machinists even though the most that could be lawfully required was the payment of fees incidental to membership. Moreover, according to Marden, even this monetary requirement was inoperative in the present case. Since the collective bargaining agreement between the IAM and NAL went too far by requiring membership rather than just money, it was illegal, hence ineffective to impose union obligations of any sort. Therefore, Marden owed neither his dollars nor his name to the Union and gave them only because he was misinformed about his obligations by the Notice of Union Membership Requirement. Now aware of his rights, Marden wants his money back." (Footnote omitted.) 576 F.2d at 578-579.

Most recently, in *Beck v. Communication Workers*, — F.2d — , 120 LRRM 2957 (4th Cir. 1985), twenty "dues-paying members" brought suit claiming that their union representative had unlawfully exacted dues money under an agency shop provision. As in this case, the union asserted that the issue was solely within the NLRB's jurisdiction. In rejecting the argument found controlling by the Ninth Circuit, the Fourth Circuit stated:

> "As their final thrust at the statutory claim of plaintiffs, defendants assert that plaintiffs' action, if sustainable, is within the jurisdiction of the National Labor Relations Board and that plaintiffs are without any justiciable remedy for the redress of this violation of their rights. Defendants conceded in their affidavits and motions, however, that a portion of the dues collected from plaintiffs by them was and will be used to finance political activities. The conscious use of such funds by the unions on their authority as the exclusive bargaining representative under the agency contract negotiated by them with the employer

is not only a violation of the statute itself but also a violation of the defendants' duty of fair representation. In either case, the action would have been within the jurisdiction of the district court under 28 U.S.C. § 1337." (Emphasis added.) 120 LRRM at 2969.

In fact, the Ninth Circuit stands alone in refusing to consider an issue or claim which alleges a breach of the duty of fair representation (in the absence of an accompanying breach of a collective bargaining agreement) that is, as well, an arguably unfair labor practice.[6] *Lewis v. Laborers Local 100,* 750 F.2d 1368, 1376-1377 (7th Cir. 1984); *Quinn v. DiGiulian,* 739 F.2d 637, 638 (D.C. Cir. 1984); and *Magallanes v. Local 300, Laborers,* 40 Cal. App.3d 809, 817 (1974); *but see Distler v. United Mine Workers,* 711 F.2d 76, 79 (7th Cir. 1983). This refusal is plainly inconsistent with the text of *Lockridge,* above quoted. 403 U.S. at 299.

The Ninth Circuit's decision is more than a little baffling. It conflicts with well-settled precedent establishing federal jurisdiction. Unless Section 301 jurisdiction is to be given two meanings—one when a collective bargaining agreement is at issue and another for union constitutions—the Ninth Circuit's decision cannot be left to stand.

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[6] It may well be that the Ninth Circuit previously exercised jurisdiction over such claims and has now, *sub silentio,* reversed itself. In *Seay v. McDonnell-Douglas Corp.,* 427 F.2d 996 (1970), the Ninth Circuit considered a claim similar to that present in *Beck,* refusing to find it within the NLRB's primary jurisdiction. *See also Beriault v. Warehousemen's Union,* 501 F.2d 258 (9th Cir. 1974).

C. By Refusing To Entertain The Defense Of Illegality, The Ninth Circuit Has Placed Itself In Conflict With Both Controlling Precedent Of This Court And Of The First Circuit.

As an alternative basis for entertaining the defense proffered, the District Court found instructive *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83-84 (1982), which held that under Section 301 any dispute as to a contract's legality must be considered, even where the issue is arguably within the NLRB's jurisdiction. The Ninth Circuit, along with the Tenth Circuit (*Mo-Kan Teamsters Pension Fund v. Creason*, 716 F.2d 772 (1983)), has given *Mullins* an unduly restrictive reading. Both circuits limit *Mullins* to attacks on specific contractual provisions. (*Infra*, p. A6; and 716 F.2d at 775.) The contract itself is immune from attack. *Id.*

In contrast, the First Circuit has correctly held that the *express wording* of *Mullins* is to the contrary. (" . . . [A] federal court has a duty to determine whether a contract violates federal law before enforcing it.", 455 U.S. at 83.) In *Courier-Citizen Co. v. Graphic Arts Local 11*, 702 F.2d 273, n. 6 (1983), the First Circuit read *Mullins* as requiring it to consider any attack on the legality of the contract. *See also ILGWU, Local 145 v. Fashion Associates*, 596 F.Supp. 77, 79 (D.N.J. 1984) (employer asserts lack of contract based on its withdrawal from multi-employer unit).

The First Circuit distinguished between providing affirmative relief, as solely within the NLRB's power, and complying with this Court's command in *Mullins* that Section 301 not be used as a mechanism for enforcing an illegal

contract. Both the First Circuit and the District Court in this case correctly noted that this distinction underlies the reasoning of *Mullins* (455 U.S. at 86). Thus, the District Court concluded that "this distinction is crucial because, where a defendant seeks no affirmative relief . . . there is no danger of a conflict in remedy between the court's ruling on the contract claim and a possible ruling of the NLRB . . ." (*Infra*, p. B5.)

If there were any doubt that *Mullins* must be given this interpretation, it was put to rest in *W. R. Grace & Co. v. Rubber Workers Local 759*, 461 U.S. 757 (1983), where a unanimous court unequivocally stated that *contracts* contrary to public policy cannot be judicially enforced. The national policy of voluntary unionism is not only set forth in numerous decisions of this Court but is expressly codified in the LMRA (29 U.S.C. §§ 157, 158(b)(1)(A)) and was reaffirmed as late as last term in *Pattern Makers League of No. America v. NLRB*, *supra*.

The Ninth Circuit's refusal to entertain this defense carves out an exception inconsistent with *Mullins* and *W. R. Grace* and rejected by the First Circuit Court of Appeals. The proposition that an illegal contract can be judicially enforced while a contract provision cannot is absurd. It requires reversal.

D. Federal Courts Have Jurisdiction To Adjudicate Purely Internal Union Matters.

Well before the blossoming of current preemption analysis, this Court established the principle that state courts are free to adjudicate purely internal union disputes. In *Ass'n of Machinists v. Gonzales*, 356 U.S. 617

(1958), a union member was permitted to sue his union for wrongful expulsion.

> "The National Labor Relations Board could not have given respondent the relief that California gave him according to its local law of contracts and damages.
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> * * *
>
> . . . [T]he subject matter of the litigation in the present case, as the parties and the court conceived it, was the breach of a contract governing the relations between respondent and his unions. The suit did not purport to remedy or regulate union conduct on the ground that it was designed to bring about employer discrimination against an employee, the evil the Board is concerned to strike at as an unfair labor practice under § 8(b) (2)." 356 U.S. at 621-22.

Though the reach of *Gonzales* has been limited, this Court has expressly refused to overrule it. *Plumbers v. Borden*, 373 U.S. 690, 697 (1963); and *Motor Coach Employees v. Lockridge, supra*, at 294-295. Rather, the Court has restricted *Gonzales* to cases where the complaint focuses *solely* on internal union matters. *Id.* Thus, *Gonzales* was inapplicable in *Lockridge, supra* at 295-296, because the crux of the action concerned the union's interference with the plaintiff's employment relationship by procuring his discharge under a union security clause, and in *Borden, supra* at 697, because the complaint focused on the plaintiff's employment as affected by the practices of the union in operating its hiring hall.

The employment relationship between Lucky Stores and Chamness, Vevoda and Sottana is not directly implicated by the proffered defense. Unlike *Lockridge*, the District Court was not required, nor did it, interpret the

union security clause in effect between Lucky Stores and Local 302. Unlike *Lockridge*, there is no claim here that Local 302 was illegally enforcing its union security clause. Rather, *irrespective of any union security clause*, Chamness, Vevoda and Sottana contended that the statements and actions of Local 302 were fraudulent under California and/or federal law. As in *Gonzales*, the focus is on the Union's contractual relationship with its members. The District Court's decision does not, nor does it attempt to, regulate the Union's conduct vis-a-vis Lucky Stores.

Moreover, by its own terms, *Lockridge* supports the District Court's jurisdiction. The *Lockridge* court went to great lengths to stress the absence of a Section 301 claim against the Union for breach of the duty of fair representation. 403 U.S. at 299. Had such a claim been present, *federal* jurisdiction existed. *Id.; see generally Beck v. Communication Workers, supra*, 120 LRRM at 2969-2970. Thus, Vevoda, Chamness and Sottana's claimed defense falls squarely within the jurisdictional ambit of *Lockridge*.

The Ninth Circuit's decision has the effect of (1) overruling *Gonzales*, despite this Court's refusal to do so, and (2) broadening the applicability of *Lockridge* to exclude Section 301 claims. The Ninth Circuit returns to the NLRB, at least in part, a class of cases which the NLRB has, with the approval of this Court, consistently refused. *NLRB v. Boeing Co., supra* at 74-75. Nor, for a variety of reasons, will the NLRB necessarily agree to accept this grant of jurisdiction. *See Jewel Tea, supra* at 687; and *Vaca supra* at 182-183. Though the Union has imposed fines totalling over $13,000.00, the Ninth Circuit

bars judicial inquiry into the most critical of all internal union matters — the voluntary undertaking of the obligations of membership.

E. The Ninth Circuit Sanctions The Right Of A Union To Lie To Its Members And Enforce The Contract That Results In Direct Conflict With California And Federal Law.

The record evidence was uncontroverted that Local 302 told Chamness, Vevoda and Sottana that they were required to sign a membership application and take a membership oath. (*Infra*, p. B2.) The record was uncontroverted that as a result of the Union's statements, each believed that they were required to become and remain full-fledged members, subject to union discipline. *Id.* The record was uncontroverted that Local 302 never told Chamness, Vevoda or Sottana the truth, nor advised them that they had a right to resign their membership in the Union. *Id.*

Nonetheless, the Ninth Circuit ruled that the consent given was freely given and that, implicitly, Chamness, Vevoda and Sottana *knowingly* became union members. (*Infra*, p. A7.) Lacking case law authority for this bizarre result, the Court reasons that it would have been "unreasonable" for union agents to know that full union membership could not be required since it was not until 1979 that the Ninth "Circuit decided that a union could not require full-fledged union membership. . ." (*Infra*, p. A7.) The justification for fraud is both factually and legally wrong, and again, contrary to precedent.

As early as 1953 this Court established the proposition that full-fledged union membership could not be compelled, *Radio Officers Union v. Labor Board,* 347 U.S. 17, 41 (1953), and reaffirmed it in 1964 in *NLRB v. General Motors Corp., supra.* Indeed, the Ninth Circuit held as much in *NLRB v. Hershey Foods Corp.,* 513 F.2d 1083, in April 1975, four years before it now says it did and well before the relevant events in this case. Quite simply, the Ninth Circuit is wrong when it states that the chief executive officer of Local 302 was legally justified in misleading Chamness, Vevoda and Sottana. Absent this "justification", there can be no doubt but that under either California or federal law, a fiduciary is not privileged to engage in such deceit.[7]

Under California law, the consent necessary for the formation of a contract must be free, or the contract may be rescinded. (California Civil Code §§ 1565, 1566.) "Apparent" consent is not free when obtained through fraud or mistake. (California Civil Code § 1567.)

California defines both the fraud or mistake necessary to vitiate consent. (California Civil Code §§ 1572, 1573, 1577, 1578.) For instance, constructive fraud is defined as "any breach of duty which, *without an actually fraudulent intent,* gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him. . ."

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[7] The Court expressly left open the issue of what substantive law—state or federal—is to be applied in § 301(a) cases involving union constitutions. *Plumbers v. Plumbers Local 334, supra,* 452 U.S. at 627. The Ninth Circuit's perfunctory analysis did not address the issue. *(Infra,* p. A7.) Hence, both California and federal law will be reviewed.

(California Civil Code § 1573(1), emphasis added.) A mistake of law is defined, in part, as "a misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law. . ." (California Civil Code § 1578(1).)

Contrary to the Ninth Circuit's belief, no element of intentionality is required.[8] It matters not whether consent is obtained through intentional misrepresentation, negligent misrepresentation, or innocent misrepresentation. In all cases, under California law, the consent is fraudulently obtained and voids the contract. *Guthrie v. Times-Mirror Co.*, 51 Cal.App.3d 879, 890 (1975); *Wood v. Kalbaugh*, 39 Cal.App.3d 926, 929 (1974); and *see generally*, "Restatement of Contracts," § 476, Comment b.

Where, as here, the misrepresentations are made by a fiduciary, the standard is stricter. California law goes so far as to *presume* the inherent unfairness of any advantage obtained by a fiduciary agent. *Boyd v. Bevilacqua*, 247 Cal.App.2d 272, 290-91 (1966) and *Platt v. Wells Fargo Bank*, 222 Cal.App.2d 658, 667 (1963), *cert. den.* 377 U.S. 965 (1964). The burden is on the fiduciary agent to demonstrate that the contract was entered into by the principal (1) voluntarily, (2) with full knowledge of all of the facts, and (3) with a *perfect* understanding of the effect of the transaction. *Webb v. Saunders*, 89 Cal.App.2d 732, 735-36 (1949). Quite obviously, the Union could not carry

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[8] As a factual matter, there was no record evidence of the Union's motives at the time the statements were made. As noted, the Union filed no counter-declarations. The Ninth Circuit's findings, if that is what they are, are pure speculation.

this burden on this record. Yet the Ninth Circuit blithely dismisses California law as unsupportive.[9]

Even if California law were not applicable, federal law imposes the identical fiduciary obligation. *Vaca v. Sipes, supra,* at 177; *Humphrey v. Moore,* 375 U.S. 335, 448 (1964); and *Ford Motor Co. v. Huffman,* 345 U.S. 330, 338 (1953) (union power "subject always to complete good faith and honesty of purpose."). Indeed, every Circuit Court of Appeal that has addressed the issue has held that a union may not mislead the employees it represents. *E.g., Teamsters Local 860 v. NLRB,* 652 F.2d 1022 (D.C. Cir. 1981). This fundamental obligation has its greatest import when a union security clause is involved. In such cases, the union has an *affirmative* duty to advise an employee as to his contractual obligations. *Robesky v. Qantas Empire Airways, Ltd.,* 573 F.2d 1082, n. 17 (9th Cir. 1978).

In both *Boosters Lodge No. 405 v. NLRB,* 412 U.S. 84, 88 (1973), and *NLRB v. Granite State Joint Board,* 409 U.S. 213, 217 (1972), this Court would not allow a union to enforce restrictions on the right to resign, contained in the union's constitution, absent actual notice to the affected members. *See generally Auto Workers, Local 1384,* 227 NLRB 1045, n. 21 (1977). Any ambiguity in the notice is a burden borne by the union as a result of its fiduciary obligation. *Cf. H. C. Macaulay Foundry Co. v. NLRB,* 553 F.2d 1198, 1201 (9th Cir. 1977).

The requirement of affirmative notice is consistent with numerous decisions issued by this Court holding that

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[9] This exact defense was sustained by a California Municipal Court under nearly identical facts. *Retail Clerks Union Local 17 v. Meilan,* Case No. C11525 (May 12, 1981), included hereto in Appendix "D".

the waiver of a statutory right must be clearly and unequivocally expressed. *E.g., Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 103 S.Ct. 1467, 1476 (1983). Becoming a union member is, of course, probably the most important statutory waiver that an employee can make, to wit, the right to refrain from union activity. 29 U.S.C. § 157. Yet, the Ninth Circuit allows Chamness, Vevoda, and Sottana to waive their Section 7 rights, not based on knowledge, but on union deceit.

In any other context, the conduct sanctioned by the Ninth Circuit would be found to be impermissible and would vitiate contractual consent. *E.g., Passaic National Bank v. Commercial National Bank,* 262 F. 234 (D.C. Cir. 1919); *see also SEC v. Blavin,* 760 F.2d 706, 711-712 (6th Cir. 1985) and *U.S. v. Dial,* 757 F.2d 163, 168 (7th Cir. 1985). It is inconceivable that a fiduciary could enter into a contract based on its own misrepresentations, whether intentional or not, and then benefit to the tune of over $13,000.00. A union "may not advance its self-interest at the expense of the union members to whom its fiduciary responsibility runs." *Ballas v. McKieran,* 35 N.Y.2d 14, *cert. den.* 419 U.S. 1034 (1974).

The Ninth Circuit's decision undercuts the rights of union members throughout this country to exercise, *freely and knowingly,* the rights guaranteed them by Section 7 of the LMRA. A little less than twenty years ago, in dissent, Justice Black noted that "[f]ew employees forced to become 'members' of the union by virtue of the union security clause will be aware of the fact that they must somehow 'limit' their membership to avoid the union's court-enforced fines. . ." *NLRB v. Allis-Chalmers, supra,* at

215. Justice Black's words are all the more prophetic where a union negotiates, as it did here, a union security clause that seemingly compels union membership and then is permitted to administer that clause in a deceitful manner. *See generally* Wellington, *Union Fines and Workers' Rights*, 85 Yale L.J. 1022 (1976). If a union may freely deceive employees into becoming members, Justice Black's "few' will become none, and the concept of voluntary unionism embedded in this nation's labor laws will be all but meaningless.

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CONCLUSION

The Ninth Circuit's decision stands in defiance of established federal law. The effective result is to dichotomize Section 301 and impair the right of union members to freely decide whether to undertake the obligations of membership. For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

December 23, 1985.

Respectfully submitted,

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APPENDIX "A"

FOR PUBLICATION
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-2282

D.C. #CV-82-5861-AJZ

MILK DRIVERS AND DAIRY EMPLOYEES UNION, TEAMSTERS LOCAL 302,

Plaintiff-Appellant,

v.

CRAIG VEVODA, KENNETH CHAMNESS and MARK SOTTANA,

Defendants-Appellees.

OPINION

(Filed September 24, 1985)

Appeal from the United States District Court
for the Northern District of California
Alfonso J. Zirpoli, District Judge, Presiding
Argued and submitted April 12, 1985, in
San Francisco, California

Before: SCHROEDER, NELSON, and REINHARDT, Circuit Judges.

SCHROEDER, Circuit Judge.

This is an action by a union to collect fines levied against three of its members who violated the union's by-laws by working behind a picket line during a strike. The district court had jurisdiction pursuant to section 301 of the National Labor Relations Act (NLRA), 29 U.S.C. § 185.

The district court granted summary judgment for the defendants. It held that although the defendants had joined the union and had accepted all the burdens and benefits of membership until the time that they crossed the picket lines, they were nevertheless not bound by the contractual provisions applicable to union embers. Defendants argued they had been fraudulently induced to join the union. They were told that, pursuant to a valid union security provision in the collective bargaining agreement, they had to become union members as a condition of employment, and they were not told that under recent case law, the membership requirements could be satisfied by merely paying dues. The district court concluded that they had not "knowingly or voluntarily" become members of the union. *Milk Drivers & Dairy Employees Union v. Vevoda*, 587 F. Supp. 483, 484 (N.D. Cal. 1984). We reverse.

The facts are straightforward. The plaintiff, Local 302, is a labor organization which at all times relevant to this action was party to a collective bargaining agreement with Lucky Stores, Inc., covering the San Francisco Bay Area. The contract between the union and Lucky Stores contained a security clause which required employees of Lucky Stores to become union members within thirty days of commencing employment.[1] The union bylaws, applicable to each member of the union, provide that, in the event of a strike, the union may fine members who continue to work.[2]

Defendants Vevoda and Sottana became employees of Lucky Stores in 1976 and joined the union shortly thereafter. Defendant Chamness had joined the union in 1956, and transferred to the plaintiff Local in 1975 when he

became an employee of Lucky Stores. According to the uncontroverted affidavits of defendants Vevoda and Sottana, a representative of the employer told each of them, soon after they were employed, that they had to go to the Teamsters Local "to fulfill certain contractual obligations" as a condition of continued employment. The affidavits further state that when Vevoda and Sottana arrived at the Local, a receptionist told them to fill out certain forms which defendants believe included a "membership application" form, and to attend an orientation meeting. At the orientation meeting, an officer of Local 302 told them they were required to take a membership oath.

Defendant Chamness joined a different local in 1956 and later transferred to Local 302. This affidavit contains parallel statements regarding his experiences with his first employer and local. However, the record does not show that any representative or employee of Local 302 made any statements whatsoever to Chamness about union membership.

All three defendants stated that they had never been told by any union representative that they could retain employment by merely paying dues and other fees. Further, they have all stated that if they had known that they did not have to become full-fledged union members, they would not have become members of Local 302. However, none of the defendants has alleged that the union ever threatened to fire him if he did not become a full-fledged member.

In 1978, the union authorized a strike against Lucky Stores and advised all of its members to honor the picket lines. Some days after the strike began, these appellees

crossed the picket lines in order to work. The union levied the fines at issue here, which were upheld through a course of internal union appeals. When the defendants refused to pay, the union filed this action. For purposes of this appeal, there is no dispute that the defendants had joined the Local and were regarded as members in good standing until the time the fines at issue were levied, that they at no time questioned the terms of their membership, and that they never sought to resign full-fledged membership.

Defendants contend that they are not contractually bound to membership in the Local. This defense is based on the construction of section 8(a)(3) and 8(b)(2) of the NLRA, 29 U.S.C. §§ 158(a)(3), (b)(2) by both the National Labor Relations Board (NLRB), and the courts reviewing NLRB decisions. Those provisions relate to labor agreements requiring union membership as a condition of employment. *See NLRB v. General Motors Corp.*, 373 U.S. 734, 83 S. Ct. 1453, 10 L.Ed.2d 670 (1963); *United Stanford Employees, Local 680 v. NLRB*, 601 F.2d 980 (9th Cir. 1979); *NLRB v. Hershey Foods Corp.*, 513 F.2d 1083 (9th Cir. 1975). Defendants place particular reliance upon our decision in *United Stanford Employees*, 601 F.2d at 982-83, holding that a union, under a security agreement similar to that here, cannot force a dues-paying member of the bargaining unit to become a full-fledged member of the union. They also rely upon *Hershey Foods Corp.*, 513 F.2d at 1085-87, where we held that unfair labor practices had been committed in connection with attempts to fire employees who offered to pay dues but refused to become full-fledged members of the union.

Consideration of the defense in this case requires the district court to evaluate a union's dealings with employees

about union membership. This is conduct closely regulated by sections 7 and 8 of the NLRA. A defense requiring judicial scrutiny of such activity is normally considered to be outside the jurisdiction of the district courts in section 301 contract actions and within the exclusive jurisdiction of the NLRB in the context of unfair labor practice disputes. *See San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S. Ct. 773, 3 L.Ed.2d 775 (1959); *Gardner v. Teamsters Union*, 346 U.S. 485, 74 S. Ct. 161, 98 L.Ed. 228 (1953); *Beriault v. Local 40, Super Cargoes & Checkers of I.L.&W.U.*, 501 F.2d 258 (9th Cir. 1974).

This doctrine, which is known as the doctrine of primary jurisdiction, recognizes the intent of Congress to have matters of national labor policy decided in the first instance by the NLRB. *Glaziers & Glassworkers Local Union No. 767 v. Custom Auto Glass Distributors*, 689 F.2d 1339, 1342 (9th Cir. 1982). The Supreme Court has stated: "As a general rule, federal courts do not have jurisdiction over activity which 'is arguably subject to § 7 or § 8 of the [NLRA]' . . . ." *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83, 102 S. Ct. 851, 859, 70 L.Ed.2d 833 (1982) (quoting *Garmon*, 359 U.S. at 245, 79 S. Ct. at 780, 3 L.Ed.2d 775). Application of the doctrine of primary jurisdiction in this case would require reversal because the district court lacked jurisdiction to consider the defense proffered by the defendants.

The defendants argue, and the district court agreed, that this defense falls within the exception to the doctrine of primary jurisdiction recognized by the Supreme Court in *Mullins*, 455 U.S. 72, 102 S.Ct. 851, 70 L.Ed.2d 833. There, the Court acknowledged that conduct committed

to the NLRB's jurisdiction pursuant to section 8 of the Act normally comes within the NLRB's exclusive jurisdiction. It held, however, that a court in a section 301 action could decide whether the particular clause in the contract which the plaintiff sought to enforce was invalid as violative of section 8(e) of the NLRA, 29 U.S.C. § 158(e) (the hot cargo clause). *Id.* at 83, 102 S. Ct. at 859, 70 L.Ed.2d 833. Defendants argue that *Mullins* created a broad exception for defenses in section 301 actions based upon conduct which arguably violates the NLRA.

We considered, and rejected, a similar argument in *Glaziers & Glassworkers Local Union No. 767,* 689 F.2d 1339. In *Glaziers* we held that the NLRB's primary jurisdiction over the maintenance of contractual relationships between employers and unions preempted the district court from adjudicating a defense of invalidity of a collective bargaining agreement. *Id.* at 1342-45. We distinguished *Mullins* because the dispute there involved the interpretation of a term of the collective bargaining agreement, and not a defense that the parties had never entered into a binding contract. *Id.* at 1343-44. In *Glaziers,* as here, the defense is not the illegality of any contractual provision, but an attempt to "avoid the entire agreement." *Id.* at 1343. As we stated in *Glaziers,* "[t]his is quite distinct from the situation in *Mullins,* where the Court heid that the district court could properly interpret a provision of a contract to determine if it was void under section 8(e) of the NLRA." *Id.* at 1343-44. Our decision in *Glaziers,* and the authorities on which it is based, requires a reversal of the district court's decision in this case.

Even if we were to agree with the defendants, however, that the subject of their fraud defense is a matter of

particular local concern and is not preempted by the primary jurisdiction of the Board, *see Belknap, Inc. v. Hale*, 463 U.S. 491, —, 103 S. Ct. 3172, 3177, 77 L.Ed.2d 798 (1983), we would have to reverse the district court. The record does not factually support the assertions, repeated throughout appellees' brief on appeal, that officials of Local 302 "lied" to the defendants or "actively misled" them into joining the union. Their affidavits recite that a receptionist handed Vevoda and Sottana membership forms and an officer administered the oath required for membership in the Local. No representative of the union ever told any of the defendants that they would be fired if they resigned from full-fledged union membership and merely paid dues. It does not appear that anyone, plaintiff or defendants, ever thought of such a possibility during the period in question. Undoubtedly the defendants were under the impression that they had to become union members, since the collective bargaining agreement so stated. But there is no suggestion that any union representatives had any knowledge of the gloss which the NLRB and the courts have superimposed upon the statutes authorizing such clauses. Indeed it would have been unreasonable to expect the union agents to have any such knowledge in this case. It was not until 1979, the year after the strike occurred (though several years before these defendants asserted their defense), that this circuit decided that a union could not require full-fledged union membership under union security agreements similar to that under which these defendants were working. *United Stanford Employees*, 601 F.2d 980.

Whether we are to apply principles of federal labor law or California fraud law, our result here would not differ.

The judgment of the district court is reversed and the matter remanded for further proceedings.

FOOTNOTES

[1] The security clause reads:

> Union Membership. Membership in the Local Union on or after the thirtieth day following the beginning of employment or the effective date of this Agreement, whichever is later, shall be a condition of employment. Upon written notice from the local Union of failure on the part of any individual to complete or maintain membership in the Local Union as above required or a failure to tender payment to the Local Union, the Employer shall, within seven (7) days of such notice, discharge said employee.

[2] The applicable union bylaws reads:

> In the event of any firm being struck or being declared unfair by the Union and a boycott is placed against such firm, any member of the Union failing to come out on strike when so requested by authorized officials of the Union shall be fined not less than One Hundred Dollars ($100.00) or expelled. . . .

In addition, the Constitution of the International Brotherhood of Teamsters, which applies to all members of local affiliates, prohibits the "crossing [of] an authorized picket line established by the member's Local Union or any other subordinate body affiliated with the International Union."

APPENDIX "B"

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-82-5861 AJZ

MILK DRIVERS AND DAIRY EMPLOYEES UNION, TEAMSTERS LOCAL 302, et al.,

Plaintiffs,

vs.

CRAIG VEVODA, et al.,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed June 29,1984)

Defendants Craig Vevoda, Kenneth Chamness, and Mark Sottana move for summary judgment in this contract action brought to enforce fines which were imposed by the union as discipline for their having worked behind Teamster picket lines during a 1978 strike against Lucky Stores, defendants' employer. The contract upon which this suit is based is that created by virtue of defendants' union membership. *See Harris v. National Union*, 98 Cal.App.2d 733 (1950). Defendants have each filed affidavits, which the union has not controverted in any way, in support of their position that they did not voluntarily become and remain full-fledged members of the union and so may not be fined in accordance with the union constitution and bylaws governing internal discipline.

Defendants' uncontroverted affidavits establish that they were told by union representatives that they "had to" fill out membership applications and "were required to take an oath of membership" if they wished to continue working for Lucky Stores, since the applicable collective bargaining agreement contained a provision stating that "[m]embership in the local union on or after the 30th day following the beginning of employment . . . shall be a condition of employment." Defendants have stated in their declarations that they believed they were required to maintain full membership in the union as a condition of employment, and that they would have resigned from the union if they had known of their right to do so without losing their jobs (so long as they continued to pay union dues). *See NLRB v. Hershey Food Corp.*, 513 F.2d 1083, 1086-87 (9th Cir. 1975). Thus, these defendants have made an uncontroverted showing that they were misled by express statements of union personnel into believing that they were required to become full members of the union in order to retain their jobs, and that they remained union members from the time that they first joined and throughout the strike only because they never learned of their right to resign from the union without forfeiting their jobs. This showing is sufficient to demonstrate that defendants did not knowingly and willingly subject themselves to the union's internal disciplinary provisions and procedures, thus precluding enforcement of the contract against them. The affirmative acts of union representatives in misinforming defendants that they were required to submit membership applications and to take the membership oath vitiated defendants' consent to enter into the contract which the union now seeks to enforce against them.

The fact that these defendants had been union members for a substantial period of time does not, by itself, ameliorate the effect of those initial misrepresentations. Nor is there any indication that these defendants ever had any reason to know, until after the fines were imposed, of their right to withdraw from the union (but to continue to pay union dues) and still retain their jobs.

The union argues that the issue of whether these defendants voluntarily became or remained full union members subject to union discipline is one which lies within the exclusive jurisdiction of the NLRB, and therefore, the court may not consider this defense. The court disagrees. While it is true that the NLRB would have jurisdiction to decide whether it was an unfair labor practice for the union to mislead defendants into becoming and remaining full members of the union and to seek to enforce these fines,[1] the court is not precluded from considering this defense where the controversy is not "identical" with that which could be presented to the NLRB. *Belknap, Inc. v. Hale*, — U.S. —, 51 U.S.L.W. 5079, 5084 (June 30, 1983).

The question presented in this case is whether the fact that these defendants did not knowingly and willingly subject themselves to union discipline precludes the enforcement of the fines against them. This is *not* identical with the question of whether the union committed an unfair labor practice. While a decision upholding the defense asserted here may well have some impact upon union prac-

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[1] *See United Stanford Employees v. NLRB*, 601 F.2d 980 (9th Cir. 1979); *Pattern Makers' League, etc. v. NLRB*, 724 F.2d 57 (7th Cir. 1983); *Machinists Local 1327 v. NLRB*, 725 F.2d 1212 (9th Cir. 1984).

tices, since it restricts a union's ability to enforce fines in certain circumstances, it does not *compel* the union to change its practices, as would be the case if the NLRB were to rule that the misrepresentations and non-disclosure that occurred in this case constituted an unfair labor practice. The resolution of this case turns upon the law of contract, not upon an interpretation of the National Labor Relations Act. Thus, the matter to be decided by this court is not identical with that which could have been presented to the NLRB, and so it does not lie within the exclusive jurisdiction of that body.

Nor is the defense asserted here preempted by the substantive provisions or policies of the federal labor law. Where there is no conflict with federal labor policy, and the controversy presented to the court is not identical with that which could be presented to the NLRB, principles which are deeply rooted in local law (such as that a contract cannot be enforced unless entered into knowingly and willingly) are not preempted. *Belknap,* — U.S. —, 51 U.S.L.W. at 5081, 5084-85. No danger of any conflict with federal labor policy is presented by entertaining the defense asserted here. It is established law that full-fledged union membership cannot be required as a condition of employment. *See Hershey Foods,* 513 F.2d at 1086-87. Whether or not the actions of the union in this case constitute an unfair labor practice, it is certainly not part of the federal labor policy to actively *prevent* the disclosure of legal rights to present and future union members. A ruling that the defense asserted here is valid under state law poses no danger of *conflict* with any ruling of the NLRB or policy of the federal labor law.

The union, relying on *Motor Coach Employees, etc. v. Lockridge,* 403 U.S. 274 (1971), argues that even if the

substance of the defense asserted in this action is in accordance with federal labor law, court jurisdiction is still preempted. The purpose of the preemption doctrine, as *Lockridge* makes clear, is to avoid conflicting *remedies*, as well as the conflicting application and interpretation of substantive rules of law. Thus, in that case, the Supreme Court noted that the avoidance of disparate remedies, even where the substantive rules are the same, may warrant a finding of preemption. 403 U.S. at 288-89 n.5. *Lockridge* is not on point, however, because it involved an action for affirmative relief (damages and reinstatement), whereas the present case involves only a defense to an action brought by the union. This distinction is crucial because, where a defendant seeks no affirmative relief, but rather merely claims that a union fine may not be enforced against him, there is no danger of a conflict in remedy between the court's ruling on the contract claim and a possible ruling of the NLRB on an unfair labor practice charge. Therefore, the admonition in *Lockridge* that the National Labor Relations Act "preempts state and federal court jurisdiction *to remedy* conduct that is arguably protected or prohibited by the Act,"[2] is not applicable to this case, in which no affirmative remedy is sought.

A case which the court finds instructive is *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982), in which the Supreme Court held that the district court erred in refusing to entertain the defendant's illegality defense to an action to enforce a collective bargaining agreement even though the defense was based upon an allegation that the clause sought to be enforced was an unfair labor practice.

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2 403 U.S. at 276 (emphasis added).

Although recognizing the "general rule" that "federal courts do not have jurisdiction over activity which 'is arguably subject to § 7 or § 8 of the [NLRA],' " the Court held that "[i]t is also well established . . . that a federal court has a duty to determine whether a contract violates federal law before enforcing it." 455 U.S. at 83. Thus, "[w]hile only the Board may provide affirmative remedies for unfair labor practices, a court may not enforce a contract provision which violates § 8(e) [of the NLRA]." *Id.* at 86. While the union argues that *Mullins* should be limited to defenses based upon § 8(e) of the Act, this court declines to give it such a narrow application. Defendants in this case seek no affirmative relief, nor are they asking the court to decide whether the union committed an unfair labor practice. Rather, they merely seek to raise the deeply-rooted defense to an action on a contract that the execution of the contract was fraudulently induced. The recognition of this defense in no way conflicts with any provision or policy of the federal labor law. Under these circumstances, the defense sought to be raised is not preempted.

Accordingly,

IT IS ORDERED that defendants' motion for summary judgment is granted.

Dated: June 29, 1984

/s/ Alfonso J. Zirpoli
United States District Judge

APPENDIX "C"

United States Code, Title 29, Section 157

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

United States Code, Title 29, Section 158(b)(1)(A)

Sec. 8. (b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . .

United States Code, Title 29, Section 301(a)

Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

United States Code, Title 28, Section 1337

Sec. 1337. Commerce and anti-trust regulations

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

California Civil Code

§ 1565. Essentials of consent

ESSENTIALS OF CONSENT. The consent of the parties to a contract must be:

1. Free;
2. Mutual; and,
3. Communicated by each to the other.

§ 1566. Consent not free; rescission

CONSENT, WHEN VOIDABLE. A consent which is not free is nevertheless not absolutely void, but may be rescinded by the parties, in the manner prescribed by the Chapter on Rescission.

§ 1567. Reality or freedom of consent; causes for defeating

APPARENT CONSENT, WHEN NOT FREE. An apparent consent is not real or free when obtained through:

1. Duress;
2. Menace;
3. Fraud;
4. Undue influence; or,
5. Mistake.

§ 1572. Actual fraud

ACTUAL FRAUD, WHAT. Actual fraud, within the meaning of this Chapter, consists in any of the following

acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract:

1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

3. The suppression of that which is true, by one having knowledge or belief of the fact;

4. A promise made without any intention of performing it; or,

5. Any other act fitted to deceive.

§ 1573. Constructive fraud

CONSTRUCTIVE FRAUD. Constructive fraud consists:

1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; or,

2. In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud.

§ 1577. Mistake of fact

MISTAKE OF FACT. Mistake of fact is a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in:

1. An unconscious ignorance or forgetfulness of a fact past or present, material to the contract; or,

2. Belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing, which has not existed.

§ 1578. Mistake of law

MISTAKE OF LAW. Mistake of law constitutes a mistake, within the meaning of this Article, only when it arises from:

1. A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or,

2. A misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify.

§ 1689. Grounds

* * *

(b) A party to a contract may rescind the contract in the following cases:

(1) If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party. . . .

APPENDIX "D"

IN THE MUNICIPAL COURT OF THE CHICO JUDICIAL DISTRICT

COUNTY OF BUTTE, STATE OF CALIFORNIA

CASE NO. C11525

RETAIL CLERKS UNION, LOCAL NO. 17,

Plaintiff,

vs

MICHAEL M. WOODS, et al.,

Defendants.

OPINION

(Filed May 12, 1981)

Union seeks to enforce fines imposed on local union members for having crossed a local union sanctioned picket line August, 1978. The fines consisted of actual wages earned by each defendant while working behind picket lines plus ¼th of the transcript costs of the local union's proceedings.

1. There is no question that a union has the power to discipline local union members.

2. The fine becomes a debt and is enforceable by local Courts.

3. Defendants claim that *if* they were not "full" members but merely "economic" members they would not be subject to discipline. This appears to be true since they would never have contracted

to be bound by the rules contained in the Union's Constitution and Bylaws.

4. What is the Union's obligation to advise employee-union eligible persons- of their choices between full membership and (for the lack of a better word) economic membership?

Exhibits Defendant A, B, C and D which are forms prepared by Plaintiff union state "The above employee has been advised of his obligation to become and remain a member of the Retail Clerk's Union within thirty-one (31) days from the date of his employment". Defendant's Exhibit G states in part, *"THE APPLICATION FOR MEMBERSHIP PROVIDED YOU MUST BE COMPLETED AND RETURNED TO THIS OFFICE WITHIN SEVEN DAYS"* . . . (Emphasis from document)

To add to this Mr. Loyd, Plaintiff's executive officer, stated Union membership was required and that *no one* told prospective members they could maintain employment if dues were paid. As near as this Court can determine one Crouch gave out "The notice to Union of new employees", and the "New member application Memo". It is unclear from the record where the actual obligation came from, how it was presented and with what language to a prospective member.

It, however, is rather clear the Union made the employer its agent to intimate that full membership was required, since the employer presented the document "Notice to Union of New Employee". Also the employer's obligation is outlined in Plaintiff's Exhibit 4, page 5, Sec. 111E (3) "-direct the new employee to report to the Union . . . and to be advised of the terms and provisions of this agree-

ment'' . . . Defendants were never referred to the Union in Chico.

The totality of the information provided new employees before membership is that *membership* is required or something will happen which has to do with the job. The Plaintiff's behavior in this case falls right in line with the behavior in United Stanford Employees and Stanford University. See Defendant's Supplemental Trial Brief.

5. Would defendants have joined the Union anyway? Meiland testified ''Not with the knowledge he has now!'' Nelson said ''he would not''. Feinblum said ''he never liked unions''. It appears to the Court that the defendants treated union membership as economic and did not consider themselves to be active participatory members.

6. The information provided prospective members was misleading and thus probably a prohibited labor practice. Where misleading information is given by a union to secure full membership the union should not then be able to reap the reward of that membership.

7. The Court does not find the trial proceeding inherently unfair, nor the amount of fines unreasonable.

8. The Court does not find that defendant Woods made a timely disaffirmance of the contract entered into during minority.

Judgment for defendant together with costs. Defendant's counsel to prepare judgment.

Date: 5-12-81

/s/ Ann H. Rutherford, Judge